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The Unauthorized Practice of Law

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STUDENT NOTES

The Unauthorized Practice of Law

"The practice of law does not lend itself to a precise and all inclusive definition."[1] The truth of this statement has long been recognized and has been generally affirmed in court opinions.[2] But, despite the difficulty, there are occasions when courts must attempt to define the practice of law or to apply prior definitions to existing cases.

The first problem encountered in attempting to determine just what the practice of law constitutes, concerns authority. To be more precise: Who has the authority to define the practice of law and who has the authority to prevent unlawful practice? Many state court decisions are found that base such authority on an inherent power of the courts stemming from a constitutional creation of a judicial branch of government.[3]

[1] Dagan v. Berman, 14 N.J. 467, 102 A.2d 765 (1954).

[2] Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R.I. 122, 179 Atl. 139 (1935).

[3] Arkansas Bar Ass'n v. Union Nat'l Bank, 224 Ark. 48, 273 S.W.2d 408 (1954); *In re* Hallinan, 43 Cal.2d 243, 272 P.2d 768 (1954); *In re* McBride, 164 Ohio St. 419, 132 N.E.2d 113 (1956).

This search for authority is not a difficult one in West Virginia. The West Virginia Constitution[4] provides that "the judicial power of the State shall be vested in a supreme court of appeals, in circuit courts and the judges thereof, and in such inferior tribunals as are herein authorized and in justices of the peace." The constitution[5] also states that "The Legislative, Executive and Judicial Departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others. . . ." These two provisions of the West Virginia Constitution would make a good argument in favor of the inherent power theory, but a West Virginia statute[6] further removes doubt. "The supreme court of appeals of West Virginia shall, from time to time, prescribe, adopt, and amend rules: (a) Defining the practice of law. . . ."

Under this authority the Supreme Court of Appeals of West Virginia in 1947 promulgated a definition of the practice of law.[7] It is a broad definition, making no attempt to cover in any detail all of the various fact situations which arise in determining when a person is or is not practicing law. However, it does set out three general services that do constitute the practice of law. Paraphrasing, they are: 1. Advice involving the application of legal principles to facts, purposes or desires; 2. Preparation of legal instruments of any character; and 3. Representing the interest of another before any tribunal—judicial, administrative or executive—otherwise than in the presentation of facts, or factual conclusions, as distinguished from legal conclusions in respect to such facts and figures.

The next logical question is how may the courts use and implement this authority. In West Virginia there is definite statutory authority[8] for the supreme court to create a West Virginia State Bar, with membership mandatory for all persons practicing law in the state. One of the purposes of the State Bar mentioned in the statute is to enforce "such rules as may be prescribed, adopted and promulgated by the court from time to time under this section." Article VIII, § 1 of the By-Laws of the West Virginia State Bar provides: "The Committee on Unlawful Practice shall have jurisdiction over all matters and questions which may be considered as constituting the unlawful practice of law under the definition of

[4] W. VA. CONST. art. VIII, § 1.
[5] W. VA. CONST. art. V, § 1.
[6] W. VA. CODE ch. 51, art. 1, § 4A (Michie 1955).
[7] W. VA. SUP. CT. RULES, 128 W. Va. XIX (1947).
[8] W. VA. CODE ch. 51, art. 1, § 4A (Michie 1955).

the practice of law adopted by the Supreme Court of Appeals of West Virginia. . . ." Other sections of this article go into detail as to the powers of the committee to investigate any unauthorized practice of law, to dismiss any complaint, to subpoena witnesses, and to institute proper proceedings to prevent such unauthorized practice.

The practice of law by laymen appears to occur most often in three areas within the legal field. The remainder of this paper will be devoted to a discussion of the problems encountered within each of the three areas. Where applicable, reference will be made to the West Virginia definition of the practice of law and its employment in solving the problems here involved.

1. *Appearance Before an Administrative Agency or Tribunal*

A recent West Virginia case[9] is directly and immediately in point on this subject. A proceeding in equity was brought by the West Virginia State Bar to enjoin a layman from representing claimants before the State Compensation Commissioner. The rules of the commission permitted such action on the part of the layman.[10] The supreme court held that it is the character of the act, and not the place where it is performed, that is the decisive factor in determining whether the act constitutes the practice of law, and that in this case the layman was practicing law. The definition adopted by the West Virginia Supreme Court, prohibiting the representation of "the interests of another before any tribunal—judicial, administrative, or executive—. . . .", would seem clearly to prohibit the activity in this case.

As to the rules of the commissioner, the court said: "The State Compensation Commissioner, as an administrative agency or tribunal, is without authority, by rule or otherwise, to permit an agent who is not a duly licensed attorney to practice before him, and a provision of any such rule which attempts to permit an agent who is not a duly licensed attorney to practice before the commissioner is void and of no force or effect."

Another question that arises in this area, as well as the other areas to be discussed later in this paper, is whether the practice of law is a constitutional right. On this point the *Early* case, *supra*, has a direct holding. "Though the right to practice law is not a natural

[9] West Virginia State Bar v. Early, 109 S.E.2d 420 (W. Va. 1959).

[10] Rule 21, *Rules and Regulations of the Workmen's Compensation Commissioner* (1949).

or constitutional right or an absolute or de jure right, it is a valuable special privilege in the nature of a franchise which may be protected by injunction against invasion." In support of this view the Supreme Court of the United States has held that the question of whether women shall be admitted to practice under provisions of the Virginia Code is for the determination of the Virginia courts alone, for the right to practice law in state courts, is not such a privilege or immunity of a citizen of the United States as is guaranteed by the Fourteenth Amendment.[11] This view also has a great deal of support in the state courts,[12] and no case has been found contra.

The situation is clouded, however, by a 1957 United States Supreme Court decision.[13] The Board of Bar Examiners of New Mexico denied petitioner a license to practice law in New Mexico on grounds of poor moral character, as shown by past Communist associations, past arrests and the use of aliases. The United States Supreme Court reversed, stating that "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protestation Clauses of the Fourteenth Amendment." The Court went on to say that "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any quelification must have a rational connection with the applicant's fitness or capacity to practice law."

Thus there are cases holding the practice of law not to be a constitutional right, and this *Schware* case holds that a person cannot be deprived of the right to practice law in contravention of the constitutional provisions. While there may seem to be some difficulty in reconciling these cases, a controlling factor may be found in the fact that in the first cases cited there were no educational qualifications, while in the latter case petitioner was educationally qualified.

As a sidelight, the West Virginia case first discussed in this area has caused two interesting developments. The Workmen's

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[11] In re Lockwood, 154 U.S. 116 (1894); Bradwell v. Illinois, 16 Wall 130 (1873); Philbrook v. Newman, 85 Fed 139 (N.D. Cal. 1898).

[12] State *ex rel.* Ralston v. Turner, 141 Neb. 556, 4 N.W.2d 302 (1942); Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1954); Richmond Ass'n of Credit Men Inc. v. Bar Ass'n, 167 Va. 327, 189 S.E. 153 (1937); *In re* Adkins, 83 W. Va. 673, 98 S.E. 888 (1919).

[13] Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

Compensation Commissioner, on July 8, 1959, promulgated an amended rule 21[14] which, recognizing the court's decision, provides in effect that, in hearings before the commissioner, a claimant or employer must appear either in person or by an attorney duly licensed and admitted to practice law in the courts of this state. The case also had later repercussions. A special committee has been named by the Board of Governors of The West Virginia State Bar to consider possible revision of the supreme court definition of the practice of law.[15]

2. *Real Estate Brokers and Legal Instruments*

A pre-trial stipulation in a 1959 Arkansas case [16] stated that "The practice of completing printed forms of instruments incidental to the completion of real estate transactions in which a real estate broker has an interest as broker has been widespread and prevalent in the State of Arkansas for a number of years and is in practice now and the said real estate brokers intend to continue said practice in the future." The brokers were in the habit of filling in forms for these instruments incident to transactions in which they were involved as brokers. The instruments included deeds, options, mortgages, leases, and many others of this general nature. The Arkansas court held that these acts constituted the practice of law and stated that "It is obvious therefore that the practice of law is not confined to services by a licensed attorney in a court of justice, but also includes any services of a legal nature rendered outside of courts and unrelated to matters pending in the courts."

Another stipulation in this case presents an additional related problem: "The forms used by the defendants have been previously approved by attorneys. . . ." As to the propriety of attorneys engaging in activities of this sort, the American Bar Association Cannons of Ethics[17] seem to be clear: "No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate."

The present definition of the practice of law in West Virginia includes the preparation "for another legal instruments of any

[14] 1 W. Va. State Bar News 499 (1959).

[15] 1 W. Va. State Bar News 521 (1959).

[16] Arkansas Bar Ass'n v. Block, 323 S.W.2d 912 (Ark. 1959).

[17] Canon 47, Amer. Bar Ass'n Canons of Professional Ethics, *American Bar Ass'n Opinions of the Committee on Professional Ethics and Grievances* (1947).

character," and so would seem to limit the activities in the principal case to the legal profession.

3. *Accountants and Tax Law*

This is perhaps the most difficult area of all, since there is obviously a close connection between the law and accounting in the tax field. The problem has been recognized in a New York case,[18] where it was stated that there is an "overlapping of law and accounting. An accountant must be familiar to a considerable extent with tax law and must employ his knowledge of the law in his accounting practice. By the same token, a tax lawyer must have an understanding of accounting. It is difficult, therefore, to draw a precise line in the tax area between the field of the accountant and the field of the lawyer." This case dealt with the problem of past municipal taxes owed, and in what year they could properly be deducted from the Federal Income Tax. Advice on the question was sought from, and given by, an accountant. The accountant had not prepared the income tax returns for the company, and it is on this point that the court apparently based its decision. Using the "incidental" test, the court held that if an accountant sets up or audits books, or advises with respect to the keeping of books and records, the making of entries therein and the handling of transactions for tax purposes and the preparation of tax returns, his work and advice must take cognizance of the law, and conform with the law, particularly the tax law. This would be permitted because the application of legal knowledge in such work is only "incidental" to the accounting functions. It would not be permitted for the accountant, despite his knowledge or use of the law, to give legal advice which is unconnected with accounting work.

In a later California case[19] the court went further than this and repudiated the "incidental" test. Here an accountant prepared Federal Income Tax returns, one of which contained an "application for a tentative carry-back adjustment." The court quoted a definition of the practice of law previously set down by the California Supreme Court in an earlier case:[20] "As the term is generally understood, the practice of the law is the doing and performing services in a court of justice, in any matter depending therein, throughout its

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[18] *In re* Bercu, 78 N.Y.S.2d 209 (1948).

[19] Agran v. Shapiro, 127 Cal. App.2d supp. 807, 273 P.2d 619 (1954).

[20] People *ex rel.* Lawyer's Institute v. Merchant's Protective Corp., 189 Cal. 531, 209 Pac. 363 (1922).